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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID JUAREZ VILLANUEVA,

Defendant and Appellant.

G055622

(Super. Ct. No. 16NF2930)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Megan Wagner, Judge. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

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A police officer detained appellant David Villanueva because he was driving with unlawfully tinted windows. When Villanueva could not produce a license or other identification, the officer asked if he could search Villanueva for anything illegal. Villanueva consented to the search, and the officer found methamphetamine and heroin in Villanueva's pocket.

Villanueva contends the trial court erred in denying his motion to suppress the drugs found in his pocket. Because substantial evidence supports the trial court's finding his consent was not coerced, and because Villanueva never affirmatively withdrew his consent, we conclude the search was lawful. We therefore affirm the judgment.

I.

FACTS

A. *The 2016 incident*

At about 1:30 a.m., a patrol officer spotted a car pulling out of a motel parking lot. The motel was known as a venue for drug sales, use, and possession. The officer pulled the car over because it had unlawfully tinted windows. The officer asked the driver, Villanueva, for his driver's license and then for some other form of identification. Villanueva answered he had none. For officer safety reasons, the officer told Villanueva to exit the vehicle, and Villanueva complied. The officer escorted Villanueva to the back of the vehicle, grabbed his hand, turned him around, and placed Villanueva's hands behind his back.

The officer asked Villanueva if he had anything illegal like drugs or guns. Villanueva answered "No." The officer then asked Villanueva, "Can I check?" and Villanueva answered, "Yes."

While the officer searched Villanueva, Villanueva asked why the officer stopped him, and the officer answered, "Because you have dark windows." The officer then asked Villanueva a second time, "Can I search?" to which Villanueva responded,

“But why? Why?” The officer asked, “Why what?,” and Villanueva answered, “Why are you searching me?”

During his search of Villanueva’s pockets, the officer found Ziploc baggies containing methamphetamine and heroin. The officer then handcuffed and arrested Villanueva.

B. The 2017 Incident

The following year, while Villanueva was released on bail, a different officer pulled him over for having tinted windows and for running a red light. When the officer learned Villanueva’s passenger was on probation and subject to search and seizure terms, the officer searched the car while Villanueva and his passenger sat nearby on the curb. The officer found a methamphetamine pipe and asked to whom the pipe belonged. Villanueva raised his hand. The officer arrested Villanueva for possession of drug paraphernalia.

C. Procedure

Villanueva was charged with a variety of drug-related offenses for both the 2016 incident and the 2017 incident, and the two cases were consolidated. Villanueva filed a motion under Penal Code¹ section 1538.5 to suppress evidence obtained during the 2016 traffic stop, arguing the detention and subsequent search were unlawful and beyond the scope of his consent. After hearing oral argument, the trial court denied Villanueva’s motion, finding “there was no gross violation of the Fourth Amendment that would warrant the extreme sanction of exclusion.”

A jury convicted Villanueva of possessing heroin and drug paraphernalia, and possessing methamphetamine for sale. The trial court found true a section 12022.1 bail enhancement and sentenced Villanueva to two years in state prison. Villanueva appealed the judgment.

¹ All further statutory references are to this code.

II.

DISCUSSION

Villanueva contends the trial court erred in denying his motion to suppress the drugs seized during the 2016 incident. According to Villanueva, he withdrew any consent to the search when the officer asked him a second time whether he could search him and he answered “why?” He alternatively argues any consent given was coerced. We conclude both arguments lack merit.

A. *Standard of Review*

In ruling on a suppression motion under section 1538.5, the trial court ““(1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated.”” (*People v. Ayala* (2000) 23 Cal.4th 225, 255.) We review the court’s application of the law to the facts de novo, but we review the court’s factual findings, express or implied, under the deferential substantial evidence standard. (*Ibid.*)

“Whether [a] search was made following a valid consent is a question of fact.” (*People v. Botos* (1972) 27 Cal.App.3d 774, 779 (*Botos*).) Thus, “[t]he trial court’s findings, on the issue of consent, whether express or implied, will be upheld on appeal if supported by substantial evidence.” (*People v. Miller* (1999) 69 Cal.App.4th 190, 202.)

B. *Principles Governing Consent to Search*

“The Fourth Amendment to the United States Constitution guarantees freedom from unreasonable search and seizure. [Citations.] A warrantless search and seizure is presumptively unreasonable under the Fourth Amendment. [Citation.] An ‘established exception to the warrant requirement is when consent is given by one authorized to give it. [Citations.] By consenting to a warrantless search, one waives the right protected by the Fourth Amendment.’” (*People v. Hawkins* (2012) 211 Cal.App.4th 194, 199.) We previously have held that officers conducting a traffic stop may seek a

driver's consent to search, even in the absence of reasonable suspicion. (*People v. Gallardo* (2005) 130 Cal.App.4th 234, 238-239.)

“[W]here the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.” (*Florida v. Royer* (1983) 460 U.S. 491, 497.) “The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of ‘objective’ reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?” (*Florida v. Jimeno* (1991) 500 U.S. 248, 251.) “[K]nowledge of a right to refuse is not a prerequisite of a voluntary consent.” (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 234.)

Consent to search must be “freely and voluntarily given”; it cannot be the result of police coercion. (*Bumper v. North Carolina* (1968) 391 U.S. 543, 548, 550.) In determining if consent was voluntary, courts consider factors such as ““(1) whether the person was in custody; (2) whether the arresting officers have their guns drawn; (3) whether Miranda warnings have been given; (4) whether the person was told [he or] she has a right not to consent; and (5) whether the person was told a search warrant could be obtained.”” (*People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1558.) Custody or the fact a defendant is placed in handcuffs does not render the consent involuntary; rather, it is only one factor to be considered. (*People v. Ratliff* (1986) 41 Cal.3d 675, 686-687.)

A suspect may withdraw consent for a search before the search takes place, but that withdrawal must be clear and affirmatively expressed to be effective. (*Botos, supra*, 27 Cal.App.3d at p. 779 [actions withdrawing consent “must be positive in nature”]; see, e.g., *People v. Hamilton* (1985) 168 Cal.App.3d 1058, 1068 [defendant withdrew consent to search bedroom by shutting door to that room].) “If equivocal, a defendant's attempt to withdraw consent is ineffective and police may reasonably continue their search pursuant to the initial grant of authority.” (*United States v. Sanders*

(8th Cir. 2005) 424 F.3d 768, 774; see, e.g., *People v. Gurtenstein* (1977) 69 Cal.App.3d 441, 451 [defendant did not withdraw consent when he refused to sign a written consent]; *Botos, supra*, 27 Cal.App.3d at p. 779 [defendant did not withdraw consent to search his locked luggage by simply denying having the keys to the luggage or by being nervous or reluctant to open the luggage].)

B. *Application*

Substantial evidence supports the trial court's conclusion Villanueva voluntarily consented to the officer's initial request to search him and that his consent was not the product of police coercion. When the officer asked if he could check Villanueva to confirm he did not have anything illegal on him like drugs or guns, Villanueva unequivocally replied, "Yes." As the officer's body cam footage confirms, the officer did not draw his gun, he did not threaten Villanueva, and he was not yelling. Although the officer asked Villanueva to put his hands behind his back before obtaining his consent, that alone does not establish coercion. As noted in *Ratliff*, "the fact that defendant was handcuffed when his consent was sought does not demonstrate that his consent to a search was involuntary." (*Ratliff, supra*, 41 Cal.3d at p. 686; see *United States v. Watson* (1976) 423 United States 411, 424 ["the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search"].)

Further, Villanueva never affirmatively withdrew his consent. After giving his express consent to search, Villanueva merely asked *why* the officer was searching him. A reasonable officer would not conclude a suspect withdrew consent to search by asking why the search was taking place. Moreover, nothing suggests the officer tried to stop Villanueva from exercising his right to withdraw consent. (Compare *United States v. McWeeney* (9th Cir. 2006) 454 F.3d 1030, 1036-1037 [defendant who had been asked to stand with his back to his vehicle may have been trying to withdraw his consent to search the vehicle when he turned around and looked back at the searching officer].)

In sum, because the search was within the scope of Villanueva's consent, because Villanueva's consent was lawfully obtained without coercion, and because he did not affirmatively withdraw his consent, the officer was entitled to search Villanueva. Because substantial evidence shows the search was consensual, we need not address Villanueva's remaining argument on whether the search was a search incident to arrest.

III.

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.